(3)

No. 90-1141

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RAFEH-RAFIE ARDESTANI, Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONER

DAVID N. SOLOWAY
Counsel of Record
CAROLYN F. SOLOWAY
Counsel for Petitioner

FRAZIER, SOLOWAY & POORAK
1800 Century Place, Suite 100
Atlanta, Georgia 30345
(404) 320-7000

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QUESTION PRESENTED

May the United States government avoid payment of attorney's fees under the Equal Access to Justice Act in deportation proceedings before immigration judges, instituted and prosecuted by the government without legal justification, solely because such proceedings are defined by, but not governed by, the Administrative Procedure Act?

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OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the Eleventh Circuit dated July 6, 1990, including the dissenting opinion of Hon. Virgil Pittman (Pet.App. A1), is reported at 904 F.2d 1505 (11th Cir. 1990).

The Order denying Petitioner's Petition for Rehearing and Suggestion of Rehearing *En Banc* dated September 5, 1990 (Pet.App. A41) is reported at 915 F.2d 698 (11th Cir. 1990).

The opinion and judgment of the Board of Immigration Appeals dated May 12, 1989 (Pet.App. A43) is not reported.

The opinion and judgment of the Immigration Court dated January 27, 1989 (Pet.App. A48) is not reported.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals (Pet.App. A1) was entered on July 6, 1990. A Petition for Rehearing and Suggestion of Rehearing *En Banc* was denied on September 5, 1990 (Pet.App. A41).

A Petition for a Writ of Certiorari was filed on December 3, 1990 and was granted on March 4, 1991.

The jurisdiction of this Court is based upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

5 U.S.C. § 504. The full text of this statute is set forth in the Petition for Writ of Certiorari at pp. 3-7. The portions of § 504 most relevant to this case are as follows:

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the

adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust....

(b)(1) For the purposes of this section -

(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise....

5 U.S.C. § 554. Adjudications. The portion of § 554 most relevant to this case is as follows:

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved-

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

STATEMENT OF THE CASE

This case involves the award of attorney's fees, pursuant to the Equal Access to Justice Act ("EAJA"), against the United States Department of Justice, Immigration and Naturalization Service ("INS") for its unjustified denial of asylum to Rafeh Rafie-Ardestani ("Petitioner"). That denial resulted in Petitioner being forced to fight her deportation in a contested deportation hearing before an immigration judge. The Immigration Court ruled in favor of the Petitioner; ruled that INS's litigation position had lacked substantial justification; and awarded attorney's fees to Petitioner under EAJA. The Board of Immigration Appeals ("BIA") reversed the attorney fee award, holding that EAJA did not apply to immigration deportation proceedings. In a divided opinion, the Eleventh Circuit Court of Appeals upheld the BIA decision.

On July 9, 1984, Petitioner, then a sixty-two year old woman of the Bahai faith, filed an application for asylum in the United States based upon her well-founded fear of persecution if she were forced to return to her native country of Iran (R. 105-109). On November 5, 1984, the United States Department of State, Office of Asylum Affairs, Bureau of Human Rights and Humanitarian Affairs determined that Petitioner had shown a "well-founded fear of persecution upon return to Iran." (R. 110). Despite this recommendation, on February 12, 1986 INS denied Petitioner's asylum application, based upon the unwarranted assertion that Petitioner had reached a "safe

haven" in Luxembourg and had established residence there. (R. 80-81).[1]

Counsel for Petitioner wrote to INS to advise that Petitioner had been in Luxembourg for only three days (as evidenced by her passport), for the sole purpose of visiting the United States Consul pending her travel to the United States. INS was further advised that during her brief stay in Luxembourg, Petitioner stayed in a hotel and at no time applied for residency in Luxembourg. (R. 82). Despite this letter, INS did not revoke its denial of asylum, but instead issued an Order to Show Cause against Petitioner, charging her with impermissibly remaining in the United States (R. 103). Counsel for Petitioner sent INS two additional letters reiterating the salient facts (R. 83-84, 85); INS ignored both letters, and continued with deportation proceedings against Petitioner. (R. 120-121).

At the hearing, Petitioner renewed her request for asylum. Petitioner's passport, introduced into evidence, revealed that Petitioner thrice had been examined by INS: (1) at her Port of Entry into the United States; (2) at the interview on her asylum application; and (3) prior to the issuance of an Order to Show Cause (when INS received a copy of Petitioner's passport that showed that she had been out of Iran for less than one month prior to entry into the United States, and that she had not received a visa

[1] Asylum in the United States is not available to one who has firmly resettled in a third country before entering the United States. 8 U.S.C. 1157(c)(1); 8 C.F.R. 208.8(f)(1)(ii). An alien is considered "firmly resettled" if he was offered resident status, citizenship status, or some other type of permanent resettlement by another nation and travelled to and entered that nation as a consequence of his flight from persecution. 8 C.F.R. § 208.14.

or grant of residency from Luxembourg). (R. 105-109, 111-119). INS presented no contrary evidence whatsoever; yet without any evidence that Petitioner had established residence in Luxembourg, INS steadfastly persisted in its unwarranted position.

The Immigration Judge rejected the position of the INS, and on October 23, 1986, Petitioner was granted asylum by the Immigration Court (R. 102). The INS did not appeal this decision. (R. 61).

Petitioner filed an application for Attorney's fees under EAJA (R. 71-96). The application stated that the position of the INS in denying Petitioner's asylum claim and in pursuing the same position before the Immigration Court had not been substantially justified. *See* 5 U.S.C. § 504(a)(1). The INS did not respond to Petitioner's application. (R. 64).

On January 27, 1989, the Immigration Court awarded Petitioner $1,071.85 in attorney's fees. (R. 61-65; Pet.App. A48). In its Order, the Immigration Court held that EAJA was available to an alien in an immigration deportation proceeding and that Petitioner was a prevailing party. (R. 61-65; Pet.App. A48). Additionally, the Immigration Court stated that:

> [Petitioner] has requested attorney fees arguing that she prevailed when she was granted asylum. Quite clearly she is correct. I note that the Service has not filed an opposition to the request [for attorney's fees]; but even if it had, it could not establish that its litigating position was justified. Prior to the issuance of the Order to Show Cause, she had provided information to the Service that she had not established residence in Luxembourg. The

> Service had ample opportunity to examine whether the information was true prior to issuing the Order to Show Cause. Further, on April 10, 1986, prior to the filing of the Order to Show Cause with this office, counsel again wrote to the district director requesting to resolve the matter before a hearing was scheduled....
>
> The Service has provided nothing in support of its position. Moreover, it is highly unlikely that anything it might have provided could have caused it to prevail here. (R. 64; Pet.App. A53-54).

Despite its failure to respond to Petitioner's fee application, INS appealed the decision of the Immigration Court to the Board of Immigration Appeals ("BIA"). (R. 5-23, 97-98). The BIA issued a decision that did not explicitly focus upon the applicability of EAJA to deportation proceedings (R. 1-4; Pet.App. A43), but ruled that regulations issued by the United States Attorney General (under whose authority the INS and the BIA operate) did not grant authority to an Immigration Court to consider an EAJA application (R. 1-4; Pet.App. A43). The BIA noted that its conclusion was contrary to *Escobar-Ruiz v. INS*, 838 F.2d 1020 (9th Cir. 1988) (*en banc*), and vacated the decision of the Immigration Court. (R. 1-4; Pet.App. A43).

Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit (R. 5-23, 97-98). The Court of Appeals, in a divided decision, rejected the holding of *Escobar-Ruiz v. INS, supra*, and held that the EAJA attorney fees provisions do not apply to such deportation proceedings (Pet.App. A1-34). In his dissenting opinion, Judge Pittman strongly urged adoption of the holding and rationale of *Escobar-Ruiz* so as not to

frustrate Congress's basic purposes in enacting EAJA (Pet.App. A34-40). He concluded that the facts of this case demonstrate the very unjustified government agency action that Congress envisioned would be covered by EAJA (Pet.App. A35).

SUMMARY OF ARGUMENT

The Equal Access to Justice Act ("EAJA") allows recovery of attorney's fees by individuals who prevail in "adversary adjudications" before administrative agencies when the position of the government is not substantially justified. EAJA defines an adversary adjudication as an adjudication "under Section 554" of the Administrative Procedure Act ("A.P.A."). Immigration deportation proceedings are within the ambit of the EAJA.

Deportation proceedings subject a person to the most severe sanctions imposed by an administrative agency. At risk, especially for persons claiming entitlement to asylum, may be "all that makes life worth living." Deportation proceedings are initiated by the Immigration and Naturalization Service ("INS") through a formal Order to Show Cause, notifying of reasons for deportation, and an alien must formally plead in response. Deportation proceedings are heard by an immigration judge of the Executive Office of Immigration Review, where deportability is determined by an adjudication on the record after a hearing. The INS is represented by counsel, and formal procedures exist for the calling of witnesses and the conduct of the hearing. Applicable statutes and regulations are extraordinarily complex.

By its terms, Section 554(a) of the A.P.A. "applies ... in every case of adjudication required by statute to be determined on the record after opportunity for an agency

hearing [except in six enumerated instances]." The Immigration and Nationality Act ("I.N.A.") requires that all adjudications made by Immigration Judges in deportation hearings be made on the record after an opportunity for a full hearing, and deportation hearings do not fall within any of the exceptions. The absence of deportation hearings in the enumerated exemptions is significant, and means that they were not intended to be exempted. Section 554 applies to deportation proceedings, and the EAJA, in turn, is applicable to those proceedings. No further inquiry is needed.

Should the Court, however, determine that even in the absence of statutory language saying so, Section 554(a)'s broad terms ("every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing") are more limited, then the terms of 5 U.S.C. § 504(a)(1) are ambiguous, and require judicial construction of "under Section 554."

In the absence of legislative context, "'*under*' Section 554" may have numerous meanings, including "as defined by," "as governed by," etc. Judicial construction requires examination of EAJA's legislative history and purposes.

EAJA's legislative history demonstrates an intention for EAJA to apply in adjudications defined by Section 554: trial-like adjudications determined on the record after a hearing. This functional approach is supported by the terminology employed in the original conference report on EAJA. It is also supported by the criticism and rejection, during EAJA's legislative re-enactment, of narrow and hyper-technical judicial and agency interpretations. Congress' express confirmation of EAJA's applicability to Social Security cases, without resolving doubt about whether such cases are governed by the A.P.A., further

demonstrates Congress' intent that a functional approach - applying EAJA when the government is represented by counsel in a trial-like proceeding - is to be employed.

EAJA expressly requires agencies to consult with the Administrative Conference of the United States before promulgating rules for its implementation. The ACUS position consistently has urged agencies to adopt a broad interpretation of "adjudications under Section 554," so that EAJA's coverage would "turn on substance - the fact that the party has endured the burden and expense of a formal hearing - rather than technicalities."

In order to further, rather than frustrate, specific legislative goals, a functional interpretation of EAJA, one that applies to deportation proceedings, is necessary. EAJA was to serve the basic purposes of reducing the economic deterrents and disparity in resources presented to a private party subjected to unjustified government action; deterring unjustified government action; and encouraging litigation to help formulate public policy.

The INS's action in denying Petitioner's asylum claim and the position it took in litigation in Petitioner's deportation proceedings were unjustified. Despite three examinations of her passport, and three letters sent to the INS by her attorney, the INS denied the Petitioner's asylum application and subjected her to deportation proceedings based upon the erroneous claim that she had been "firmly resettled" (i.e. received resident or citizen status) in a third country. The Petitioner, persecuted in her native Iran for her religious beliefs, had stayed in a hotel in Luxembourg for only three days (as evidenced by her passport), for the sole purpose of visiting the United States Consul pending her travel to the United States.

As a result of this unjustified action by the INS, Petitioner was forced to shoulder the burden and expense of a deportation hearing, and to bear the trauma of facing deportation to a country where the Department of State had already concluded she was in sufficient danger of persecution to warrant a grant of asylum in this country. The EAJA was enacted precisely to compensate persons like Petitioner who are forced to defend themselves in court as a result of unjustified government action.

Deportation proceedings meet all of the elements of an "adversary adjudication" as defined in Section 554. The legislative purposes of EAJA are served by government accountability under EAJA. The INS should not be able to avoid payment of EAJA attorney's fees awarded by the immigration judge solely because deportation proceedings, though conforming to the requirements of the A.P.A., are not strictly governed by it.

Nor does Section 292 of the Immigration and Nationality Act, which parenthetically states that persons in deportation proceedings are not entitled to have government-appointed counsel, remove deportation proceedings from EAJA's coverage. That statute addresses the relationship between indigency and the right to counsel; EAJA is a fee-shifting statute invoked when the government's action is unjustified. The two statutes are not incompatible, and they are perfectly capable of co-existence. *Marcello v. Bonds*, which merely held that a specific portion of the I.N.S.'s hearing provisions (which used to, but no longer, differ from the A.P.A. with respect to the dual role permitted immigration judges) superceded the corresponding hearing provisions of the A.P.A., similarly does not permit the INS to escape EAJA accountability.

ARGUMENT

I. ATTORNEY FEE AWARDS ARE RECOVERABLE IN IMMIGRATION DEPORTATION PROCEEDINGS BECAUSE THEY ARE "ADVERSARY ADJUDICATIONS" UNDER THE EQUAL ACCESS TO JUSTICE ACT ("EAJA").

A. THE NATURE OF DEPORTATION PROCEEDINGS.

EAJA provides for the recovery of attorney's fees by private parties who prevail in "adversary adjudications" before federal administrative agencies in which the position of the government is not substantially justified. 5 U.S.C. § 504 (a)(1). Deportation proceedings are adversary adjudications under the EAJA.

Deportation proceedings visit upon people the most severe sanctions that may be imposed by an administrative agency. Deportation "is a drastic measure and at times the equivalent of banishment or exile." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). As Justice Brandeis recognized, deportation may result "in loss of both property and life, or of all that makes life worth living." *N.G. Fung Ho v. White*, 259 U.S. 276, 284 (1922). For those seeking asylum, such as Petitioner, the consequenses of deportation is most severe. "Deportation ... is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her own country." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).[2]

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[2] People with valid claims for political asylum, such as the Petitioner, are not the only persons subjected to deportation. Spouses of United States citizens (8 C.F.R. § 242.17(a)), or even

Those faced with deportation are confronted with a maze of detailed procedures and regulations in an adversary proceeding. Deportation proceedings are initiated by the INS through the issuance of an order to show cause, explaining why a person should be deported. 8 C.F.R. § 242.1(a). An alien is required to plead to the INS charges. 8 C.F.R. § 242.16(b). Deportation proceedings are heard before an immigration judge of the Executive Office of Immigration Review. 8 C.F.R. § 3.14(a). There, deportability is determined by an adjudication on the record after a hearing. I.N.A. § 242(b), 8 U.S.C. § 1252(b); 8 C.F.R. §§ 3.26, 3.34, 242.15. At the hearing, the INS is represented by counsel. 8 C.F.R. § 242.16(c). The alien has a right to examine evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the government. I.N.A. § 242(b), 8 U.S.C. § 1252(b). The immigration judge may issue subpoenas for depositions and for hearings. 8 C.F.R. §§ 3.33, 242.14(e).

Deportation proceedings are peculiarly complex. They require navigating "a baffling skein of provisions" resembling "King Mino's labyrinth in ancient Crete," *Loc v. INS*, 548 F.2d 37, 38 (2d Cir. 1977), and to address laws which "have been termed 'second only to the Internal Revenue Code in complexity.'" (citation omitted) *Castro-O'Ryan v. Dept. of Immigration and Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1988). *See also, Dong Sik Kwon v. INS*, 646 F.2d 909, 919 (5th Cir. 1981).

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nationals of the United States and those immediately eligible for naturalization (8 C.F.R. § 242.7(a)(1),(e)) may be subjected to deportation proceedings.

B. DEPORTATION PROCEEDINGS ARE DEFINED UNDER SECTION 554 OF THE ADMINISTRATIVE PROCEDURE ACT, AND THEREFORE ARE COVERED BY THE EAJA.

EAJA defines an adversary adjudication as "an adjudication under section 554 of this title in which the position of the United States is represented by counsel..." 5 U.S.C. § 504 (b)(1)(C). The INS concedes, as it must, that it was "represented by counsel" in this deportation proceeding. *See Escobar-Ruiz*, 838 F.2d at 1023 n.2.

Section 554(a) defines adjudications as "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." The statute then lists six exemptions. It is uncontroverted that Immigration statutes and regulations require adjudication on the record after a hearing has been conducted. I.N.A. § 242(b), 8 U.S.C. § 1252(b); 8 C.F.R. §§ 242.15-242.16. Section 554(a)'s definition is met in deportation proceedings. Section 554(a), governing the applicability of EAJA to cases such as deportation, does not demand that the statute requiring a hearing on the record be identical to Section 7 of the A.P.A., 4 U.S.C. § 556.

There also can be no question that the express exemptions to Section 554 are inapplicable to deportation proceedings. The common rule of statutory construction is that Congress knows how to include a category if it chooses to do so, and that its silence is controlling. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522-523 (1983). Section 554 applies to deportation proceedings, and the EAJA, in turn, is applicable to those proceedings. No further inquiry is needed.

In the event, however, that this Court determines that even in the absence of statutory language saying so, Section 554(a)'s broad terms ("every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing") are more limited, then the terms of 5 U.S.C § 504(a)(1) are ambiguous, and require judicial construction of "under Section 554."

Judicial construction, then, of the phrase "under Section 554" is pivotal in determining that the EAJA applies to deportation proceedings. The Court's duty in interpreting statutory language is to find that interpretation which most fairly is imbedded in the statute, and which fulfills the scheme and general purposes intended by Congress. *Commissioner v. Engle*, 464 U.S. 206 (1984).

"*Under* section 554," if not construed to mean literally "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing [except in six enumerated instances]," is ambiguous, and susceptible to multiple plausible constructions. There are as many as twenty-five different definitions of the preposition "under." *See 18 The Oxford English Dictionary 947-951* (2d ed. 1989). In some contexts, "under" can mean "defined by"; in others, it may mean "subject to" or "governed by." *Id.*[3]

[3] This Court, in a case quite similar to the case at bar, upheld an interpretation of the term "*under* applicable state law" that was flexibly interpreted according to its context. In *Mississippi River Fuel Corp. v. Slayton*, 359 F.2d 106 (8th Cir. 1966), the Court of Appeals held that the term applied not only to state statutes, but must be interpreted to include common law interpretations of contract provisions. The court stated: "'under' does not connote quite so strongly the specification of a statute but, rather, rights anbd duties measured by law generally." *Id.* at 119. Although reversed on other grounds, this Court specifically upheld the broad interpretation given to the term "under" by the Court of Appeals. *Levin v. Mississippi River Fuel Corp.*, 386 U.S. 162, 168 (1967). (the term "under applicable state law ... embraced all state law," not just state statutes.)

In Escobar-Ruiz, the Ninth Circuit looked to the EAJA's purposes, concluding that "under Section 554" means "as defined by Section 554." 838 F.2d at 1024; accord *Cornella v. Schweiker*, 728 F.2d 978, 988 (8th Cir. 1984). The court below, however, applied a wooden and highly technical interpretation to "under," concluding that "under Section 554" means "governed by Section 554." In doing so, it wholly ignored the critical fact that deportation proceedings before the Immigration Court are virtually identical to those defined by Section 554. *See* Pet.App. at A36-A39 (Pittman, J., dissenting). Because the statute is ambiguous, the Court must look to the EAJA's underlying purposes and history in construing the term. *See Commissioner v. Engle, supra.*

Statutory construction cannot be an inert exercise in grammar or literary composition (*Lynch v. Overholser* 369 U.S. 705, 710 (1962)); in order to glean the correct meaning of an ambiguous statutory term, the Court must look to the legislative history and purpose of the statute. *See: Blum v. Stenson* 465 U.S. 886, 896 (1984).[4] The

[4] Even if, *arguendo*, the controlling phrase "under Section 554" were plain and unambiguous on its face, the Court still should look at the legislative history if the plain meaning of the words is at variance with the policy of the statute as a whole. *United States v. American Trucking Association* 310 U.S. 534, 543-44 (1940). This is particularly true for statutory construction in a case of first impression. *United States v. Dadanian* 818 F.2d 1443, 1448 (9th Cir. 1987). The court should examine the legislative history "in order

legislative history of EAJA and the policy of the statute as a whole, mandate a conclusion that "*under* Section 554" includes proceedings "*defined by* Section 554," and that deportation proceedings are therefore within the ambit of the statute.

1. THE LEGISLATIVE HISTORY MANDATES A JUDICIAL CONSTRUCTION OF "UNDER SECTION 554" THAT ALLOWS THE EAJA TO REACH DEPORTATION PROCEEDINGS

The House Conference Committee report on EAJA, particularly probative because it presents the views of both the House and the Senate on H.R. 5612 (which eventually became the EAJA statute), expressly stated that the statute "defines adversary adjudication as an agency adjudication *defined under* the Administrative Procedures [sic] Act where the agency takes a position through representation by counsel or otherwise." H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess.23 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News, 5003, 5012 *(emphasis added)*. Reference to Section 554 was intended by Congress to differentiate between trial-like adjudications covered by the EAJA, and rule-making proceedings outside the scope of the EAJA, rather than differenciate between functionally (and to a large extent literally) identical adjudications according to the identification of the statute that technically authorized the adjudication.

Moreover, in the evolution of the statute, Congress substituted the words "an adjudication *under* section 554" in place of "an adjudication *subject to* section 554." *(emphasis added)*, H. Rep. No. 96-1418, 96th Cong. 2d. Sess. (1980),

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to determine whether literal application of the statute would 'pervert its manifest purpose.'" *Berger v. Heckler*, 771 F.2d 1556, 1571 (2d Cir. 1985) (quoting *United States v. Perdue Farms, Inc.*, 680 F.2d 277, 280 (2nd Cir. 1982).

reprinted in 1980 U.S. Code Cong. & Ad. News, 4984. This evidences Congress's intent not to require that a procedure directly be subject to that section.

A broad interpretation of "adversary adjudication" is supported not only by the legislative history, but also by the Administrative Conference of the United States ("ACUS"). *See* 46 Fed. Reg. 32,900 *et seq.* (June 25, 1990). The ACUS interpretation deserves special deference because the statute itself requires agencies to consult with the ACUS chairman before promulgating rules for implementation of EAJA. *See* 5 U.S.C. § 504(c)(1). In the ACUS statement, the Chairman advised agencies to adopt a broad interpretation of adjudications under Section 554, and to avoid technical disputes about whether a particular proceeding fell within the statute's coverage. *Office of the Chairman of the Administrative Conference of the United States Equal Access to Justice Act: Agency Implementation*, 46 Fed. Reg. 32,901. The Statement expressly provides that, in light of the basic purposes of EAJA, any "questions of EAJA's coverage should turn on substance - the fact that the party has endured the burden and expense of a formal hearing - rather than technicalities." *Id.*

Indeed, ACUS recognized, before the original passage of the EAJA, that the EAJA's purposes could be undermined by a narrow interpretation of its applicability to administrative adjudications. ACUS sent a letter to the House Judiciary Committee, during its consideration of EAJA, stating "[i]f a statute requires that an agency adjudication be 'determined on the record after an opportunity for an agency hearing' [as required by Section 554 (a) of the APA] ... then the section clearly applies." *Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, on S. 265, Award of Attorneys' Fees against the Federal Government*, 96th Cong., 2d Sess. ["Hearings on S. 265"] 536 (letter from Richard K. Berg, Executive

Secretary, Administrative Conference of the United States, to Hon. Peter W. Rodino, Jr., Chairman, Committee on the Judiciary, June 20, 1980) [5]

The ACUS Model Rules for Agency Implementation of EAJA addressed the scope of "under Section 554," and urged a broad interpretation based upon meeting Section 554(a)'s definition of trial-type hearings:

> The Equal Access to Justice Act provides, in 5 U.S.C. 504(b)(1)(C), that covered adversary adjudications are those "under section 554 of this title in which the position of the United States is represented by counsel or otherwise." Section 554 of the Administrative Procedure Act applies .... to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." Exactly what proceedings are to be encompassed by this language has long been a difficult legal question, and we proposed a broad interpretation of the reference to adjudications "under section 554"....

46 Fed. Reg. 32,900, 32,901 (1981).

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[5] ACUS was commenting on an earlier version of the bill that referred to "adjudications *subject to* Section 554." *See* H.R. 6336, 96th Cong., 2d Sess, § 3 (a) (1980) *reprinted in Hearings on S. 265*, 155, 156. Accordingly, EAJA was intended to reach all administrative proceedings determined on the record, after an opportunity for an agency hearing, rather than merely to reach proceedings "governed by" Section 554, even when the bill's operative language contained the more restrictive term "subject to" Section 554. *See Supra* note 2.

After legislative hearings addressing widespread concerns that EAJA's original purposes were being undermined, Congress reauthorized and amended the statute in 1985 and, in so doing, repeatedly expressed its disapproval of restrictive interpretations by both agencies and courts. See, H.R. No. 99-120 (1985), 1985 U.S. Code Cong. & Ad. News, 132, 137. *See also* H.R. Rep. No. 99-120, *supra.* at 145 [rejecting ruling in *Tulalip Tribes of Washington v. Federal Energy Regulation Commission*, 749 F.2d 1367 (9th Cir., 1984), that a statute's specific preclusion against assessment of costs against the FERC barred action for attorney's fees under Section 2412 (d)(1)(A)]; see also, H.R. Rep. No. 99-120, *supra.* at 132, 150 [criticizing misconstruction of the original EAJA, and amending statute to clarify its applicability to the Contract Disputes Act]. In addition, Congress took issue with "overly technical" judicial construction of such terms as "substantially justified," *id.* at 146 n. 26, and "prevailing party" *Id.* at 147. The Committee emphasized that the Act contemplated "an expansive view," *id.*, and a "broader meaning" for its terminology. *Id.* at 137.[6] It is implausible that a Congress which made clear that the EAJA's original purposes were remedial would embrace a definition of "adversary adjudication" that hinged upon whether a proceeding was technically "subject to" the APA, rather than whether, in substance, it was the functional equivalent of a proceeding under the APA, as are deportation proceedings.

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[6] During the floor discussions upon re-enactment, Sen. Grassley stated that the bill made certain clarifications which were "necessary because of a few court opinions that failed to focus on the incentive for careful agency action." 131 Cong. Rec. S9991-02, 99th Cong., 1st Sess. There had not then been any judicial decisions excluding applicability of EAJA from deportation proceedings; had such a misinterpretation of the statute been reported, it similarly would have been scorned as an overly technical interpretation, failing to focus upon the statute's purposes.

Congress's intention for EAJA to extend to truly adjudicative procedures that have the essential characteristics of APA proceedings, including those not technically "subject to" Section 554, is made clear by its treatment of Social Security cases. At least since *Richardson v. Perales* 402 U.S. 389 (1971), when this Court declined to decide whether the APA applies to Social Security disability claims, *Id.* at 410, there has been doubt about whether Social Security hearings are governed by Section 554 of the APA. Nevertheless, without resolving that issue, Congress expressly has confirmed the EAJA's applicability to Social Security disability claims in which the government is represented. *See* H.R. Rep. No. 120, 99th Cong. 1st Sess. 10, *reprinted in* 1985 U.S. Code Cong. & Ad. News 132, 138-139; 131 Cong. Rec. S. 9993-9994 (July 24, 1985) (statement of Sen. Heflin); *Escobar-Ruiz*, 838 F.2d at 1026-27. Evidently, Congress believed it unnecessary to resolve whether the APA applied to such claims, since applicability of EAJA was to be determined by the adversarial nature of the proceeding, rather than by the identity of the governing statute. *See id.*

Moreover, this Court's treatment in *Sullivan v. Hudson*, 490 U.S. 877, 109 S.Ct. 2248, 104 L.Ed.2d 841 (1989), rejected a blanket exclusion for all Social Security claims. Notwithstanding its determination that the Social Security proceeding was not adversarial within the meaning of § 504(b)(1)(C) of the A.P.A., this Court refused to accept the agency's call for a blanket exclusion. The EAJA statute, and its legislative history refer throughout to "the government," the "United States" or "federal agencies." Congress made no effort to exclude agencies simply because they had adversarial adjudications that were not subject to the A.P.A. The legislative history compels a conclusion that the adversarial nature of the adjudication is to be the hallmark of whether the proceeding is covered under the EAJA. S. Rep. No. 253, 96th Cong., 1st Sess. at 4, 5-6 (July 20, 1979); H. Rep. No. 1418, 96th Cong., 2d Sess. at 10, *reprinted in* 1980

U.S. Code Cong. & Ad. News, 4984, 4988; H. Rep. No. 1434, 96th Cong., 2d Sess. at 21 (Sept. 30, 1980).

2. FULFILLMENT OF CONGRESSIONAL PURPOSES MANDATES A JUDICIAL CONSTRUCTION ALLOWING THE EAJA TO REACH DEPORTATION PROCEEDINGS

The express purpose of EAJA is to reduce the economic deterrents and the disparity in resources and expertise between the United States Government, and those who would seek review of, or who would defend against, unjustified governmental action. H.R. No. 96-1418, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S. Code Cong. and Ad. News, 4984. EAJA represents Congressional recognition that, in the absence of such a provision, a party may have no realistic opportunity to respond to unjustified governmental action, and no effective remedy to secure vindication of his or her rights, causing the individual to endure an injustice rather than to contest it. *Id.* at 4988; *see also, Spencer v. N.L.R.B.*, 712 F.2d 539, 549 (D.C. Cir. 1983) (objective of EAJA is to encourage relatively impecunious private parties to challenge unreasonable or oppressive governmental action by relieving them of the fear of incurring large litigation expenses), *Commissioner, I.N.S. v. Jean*, ___ U.S. ___, 110 S.Ct. 2316, 2321 (1990) ("[T]he specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." (citation omitted)).

EAJA also was intended to deter unjustified government action. H.R. No. 96-1418, 96th Cong., 2d Sess. (1980) *reprinted in* 1980 U.S. Code Cong. and Ad. News, at 4991 ("[EAJA] helps assure that administrative decisions reflect informed deliberation. In so doing, fee-shifting becomes an instrument for curbing excessive regulation and the unreasonable exercise of Government authority.") *See also Jean*, 110 S.Ct. at 2322.

Moreover, EAJA is premised upon the concept that one who litigates against the government is "refining and formulating public policy ... provid[ing] a concrete, adversarial test of Government regulation...." H.R. Rep. No. 96-1418 at 4988. Congress wanted to avoid the establishment of legal precedent in cases where decisions would be based upon the costs of litigating, rather than upon the merits; Congress believed this would enhance the integrity of the judicial process. *Id.* at 4988-4989.

As a remedial statute, EAJA is entitled to a judicial construction enabling its objectives to be accomplished. The important public policies that led Congress to enact and re-enact EAJA dictate that successful litigants in deportation proceedings have the right to seek EAJA awards. *Escobar-Ruiz*, 838 F.2d at 1025, *citing* H.R. Rep No. 96-1418, 96th Cong., 2d Session 10 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984, 4988-4989. Judicial construction of the EAJA requires an endeavor to interpret the fee statute "in light of its purpose 'to diminish the deterrent effect of seeking review of, or defending against, [unjustified] governmental action....'" *Sullivan v. Hudson* 490 U.S. 877, 890, 109 S.Ct. 2248, 104 L.Ed.2d 841, 954 (1989).

Those subjected to deportation proceedings require the help of an attorney because deportation proceedings are "difficult for aliens to fully comprehend, let alone conduct" without the assistance of counsel. *Escobar-Ruiz*, 838 F.2d at 1025, *citing* H.R. Rep. No. 1418, 96th Cong., 2d. Sess. 10 1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984, 4988-89. Immigration proceedings have been recognized as being so complex and so lacking in consistency as to be incomprehensible to the layman and the general practitioner alike. *See Loc v. INS*, 548 F.2d 27, 28 (2d Cir. 1977). Immigration regulations are so complex that one court has said:

> Whatever guidance the regulations furnish to those cognoscenti familiar with INS procedures, this court, despite many years of legal experience, finds that they yield up meaning only grudgingly and that morsels of comprehension must be pried from mollusks of jargon.

Dong Sik Kwon v. INS, 646 F.2d 909, 919 (5th Cir. 1981).

Without the possibility of EAJA awards, individuals are likely to be discouraged from vindicating their rights against unreasonable government action, because immigration proceedings tend to be time-consuming and expensive. *Escobar-Ruiz*, 838 F.2d at 1025. Allowing important government immigration policies to remain unchallenged contradicts one of the primary purposes of EAJA: "to increase the accessibility to justice in administrative proceedings." *Id.*, citing H.R. Rep. No. 120, 99th Cong., 1st Sess., pt. 1, at 8 (1985), reprinted in 1985 U.S. Code Cong. & Ad. News 132, 136.

The risk of a fee award under EAJA was seen by Congress as "an incentive for agencies to police their own enforcement and other litigation activities more rigorously, so that only sound, well-prepared cases would be initiated or litigated. Robertson and Fowler, *Recovering Attorney's Fees from the Government Under EAJA*, 56 Tulane L. Rev. 903, 914 (1982). A primary purpose of EAJA is to refine the administration of federal law and to foster greater precision, efficiency and fairness in the interpretation of statutes and in the formulation and enforcement of governmental regulation. *See Spencer*, 712 F.2d at 541.

These general purposes of the EAJA – as well as Congress' specific intent to make the EAJA applicable to all formal adjudications in which the government is represented by counsel – would be severely undermined by the position urged here by the INS.

D. *MARCELLO V. BONDS* DOES NOT PRECLUDE THE APPLICATION OF EAJA TO DEPORTATION PROCEEDINGS.

The INS has urged a strained and legally erroneous reading of *Marcello v. Bonds*, 349 U.S. 302 (1955) for the proposition that the EAJA should not apply to deportation proceedings. *Marcello* specifically addressed the narrow issue of whether an Immigration Judge (who at that time had enforcement functions and was also under the jurisdiction of the INS District Director) could sit as an adjudicative officer. At the time that *Marcello* was decided, the only material difference that the Supreme Court could find between the A.P.A. and the I.N.A.'s deportation section was who could sit as an administrative judge, and who could sit as an immigration judge. The A.P.A., unlike the I.N.A., required that the functions of enforcement and adjudication be separate. The Court concluded, that by virtue of its specialized and unique provision for the co-identity of the immigration judge and the adjudicative officer, the I.N.A.'s hearing procedures superseded those contained in the A.P.A.[7]

The Supreme Court's reasoning in *Marcello* does not impede EAJA's application to the procedures currently followed in deportation proceedings. As *Marcello* itself noted,

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[7] In response to *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), which had held that the A.P.A. applied to deportation proceedings, Congress had passed a rider to the Supplemental Appropriations Act of 1951, 64 Stat. 1044, 1048 (1950), exempting deportation and exclusion proceedings from Section 554, 556 and 557 of the A.P.A. The Immigration and Nationality Act of 1952, however, repealed the rider, leaving the relationship between the A.P.A. and deportation proceedings uncertain. (This appears to have left the A.P.A. applicable to immigration cases unless "other provisions of the 1952 Immigration Act made the [A.P.A.] inapplicable." *Marcello*, 349 U.S. at 316 (Black, J., dissenting).

the A.P.A. had served as the model for § 242(b) of the I.N.A. and, as a result (with the one exception noted above), there was a virtual identity between the procedures governing deportation in § 242(b) of the I.N.A. and formal adjudications in §§ 554, 556 and 557 of the A.P.A. 349 U.S. at 307-08. The I.N.A. and the A.P.A. granted equivalent protections in procedural matters.[8] Today, as in *Marcello*'s time, both statutes require determinations made on the record; a proceeding at which the party has made a personal appearance; reasonable notice of charges and time and place of hearing; the privilege of representation by counsel; reasonable opportunity to present evidence and cross-examine witnesses; and decisions based upon reasonable, substantial and probative evidence.

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[8] Justices Black and Frankfurter co-authored a strongly worded dissent, asserting that upon the enactment of the Immigration and Nationality Act of 1952, the Senators and House members who had voted for the bill had been assured by the bill's sponsors that the A.P.A. was applicable to immigration cases. 349 U.S. at 302. The legislative history of the I.N.A. clearly bears this out. Senator McCarren, the sponsor of both the A.P.A. and the I.N.A. in the Senate, told Congress that the I.N.A. was not to be construed as a blanket exemption from the A.P.A. and that "this bill eliminates such an exemption in the case of deportation proceedings...." 98 Cong. Rec. 5625-26; *see also* Conf. Rep. No. 2096 (June 9, 1952), *reprinted in* 1952 U.S. Cong. & Ad. News 1754 ("the procedures provided in the bill ... remain within the framework ... of the Administrative Procedure Act"). In advocating enactment of the I.N.A., Senator McCarren told Congress: "The [A.P.A.] is made applicable to the bill [the I.N.A.]. The [A.P.A.] prevails now.... The bill [the I.N.A.] ... makes the [A.P.A.] applicable insofar as the administration of the bill is concerned.... The [A.P.A.] is the law." 98 Cong. Rec. 5778-79 (May 22, 1952). Senator McCarren further stated: "perusal of the bill will convince any fair minded man that the bill is one hundred percent within the framework of the [A.P.A.]...." 98 Cong. Rec. 5329. Representative Walters made similar comments. 98 Cong. Rec. 4416, 99 Cong. Rec. 4302.

Against the background of these parallel provisions, *Marcello* interpreted as an intentional departure from § 554(d) of the A.P.A. the one deviation in the I.N.A.: its failure to expressly require a separation-of-functions between hearing officers and prosecutors or investigators. *Marcello* did not say that the I.N.A. departed from Section 554(a) of the A.P.A. (which makes EAJA apply in deportation proceedings, as in "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing [except in six enumerated instances]"), nor did *Marcello* purport to address or rule whether all aspects of the A.P.A. were superseded.

Since the establishment of the Executive Office of Immigration Review by regulations promulgated by the Attorney General, 48 Fed. Reg. 3038-3040 (Feb. 25, 1983), deportation hearings completely conform to the procedural requirements for formal adjudication under the A.P.A. Under current regulations, 8 C.F.R. §§ 3.0 *et seq.*, immigration judges are part of a separate Executive Office of Immigration Review, are no longer supervised by the Commissioner of the INS, and have no enforcement functions. *See* 8 C.F.R. §§ 3.0, 3.10. The separate functions requirement of the A.P.A. has been adopted in immigration proceedings, and the basic distinction drawn by the Court in *Marcello* no longer is an issue.

Since deportation hearings are, in substance, indistinguishable from § 554 proceedings, they confront litigants with the same costs and burdens as in a proceeding directly governed by the A.P.A. 46 Fed. Reg. 32,900, 32,901 (1981). They are, therefore, precisely the type of adversary adjudication Congress intended to be covered by EAJA. *See Escobar-Ruiz*, 838 F.2d at 1024-25; H.R. Rep. No. 120, 99th Cong., 1st Sess., pt.1, 10, *reprinted in*, 1985 U.S. Code Cong. & Ad. News 132, 138-139.

II. SECTION 292 OF THE IMMIGRATION AND NATURALIZATION ACT ("INA") DOES NOT BAR GOVERNMENT ACCOUNTABILITY UNDER EAJA.

Section 292 of the INA provides that an individual in a deportation proceeding "shall have the privilege of being represented (at no expense to the Government) by such counsel ... as he shall choose." 8 U.S.C. § 1362. The court below held that the application of the fee shifting provisions of EAJA were overridden by the INA's requirement that legal representation be at no expense to the government. That conclusion misconstrues the relevant provisions of both EAJA and the INA.

The legislative history of EAJA clearly states that Congress simply did not wish to apply EAJA where statutes already "specifically provide" for alternative fee-shifting:

> The subsection applies to all civil actions except ... those already covered by existing ***fee-shifting statutes***.... [T]his section is not intended to replace or supersede any existing fee-statutes such as the Freedom of Information Act, the Civil Rights Act, and the Voting Rights Act in which Congress has indicated a specific intent to encourage vigorous enforcement, or to alter the standards or the case law governing those Acts. It is intended to apply only to cases ... where fee awards against the government are not already authorized.

H.R. Rep. No. 1418, 96th Cong., 2d Sess., 18 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984, 4997. (emphasis added).

The INA does not contain any such fee-shifting mechanisms. The parenthetical phrase "at no expense to the government" merely relieves the government of the

obligation to provide counsel to indigent aliens.[9] *See generally, Perez-Perez v. Hanberry*, 781 F.2d 1477 (11th Cir. 1986). The 1952 legislative history of Section 292, enacted decades before the EAJA, does not demonstrate an intent to bar fee shifting in deportation proceedings, let alone an intent anticipatorily to prohibit fee shifting under EAJA. *See* H.R. Rep. No. 1365, 82nd Cong., 2d Sess. (1952), *reprinted in* 1952 U.S. Code Cong. & Ad. News 1653, 1712; *Escobar-Ruiz* 838 F.2d at 1028.

Absent an intention to direct one litigant to pay another's attorney's fees, Section 292 is not a "fee-shifting" statute, and is not a barrier to the proper interpretation of EAJA applicability.[10] A similar issue was addressed in *Wolverton v. Heckler*, 726 F.2d 580 (1984), where the court examined the Social Security Act's limitation of the amount a successful claimant must pay toward attorney's fees (42 U.S.C. § 406(b)). *Wolverton* concluded that the provisions were not "fee-shifting," and that applicability of EAJA to Social Security claims would not impermissibly supersede an existing fee-shifting statute. *Wolverton*, 726 F.2d at 582.

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[9] The Fifth Amendment, however, may require that counsel be appointed at government expense. See *Aguilera-Enriquez v. I.N.S.* 516 F.2d 565, 569 (6th Cir. 1975, *cert. denied*, 423 U.S. 1050 (1976); *Martin-Mendoza v. I.N.S.* 499 F.2d 918, 922 (9th Cir. 1974), *cert. denied*, 419 U.S. 113 (1975); Note, *Right to Counsel in a Deportation Hearing*, 63 Wash.L.Rev. 1019, 1027 (1988).

[10] The INA committee report discusses § 292 when it describes the rights aliens have in deportation hearings. H.R. Rep. No. 1365, 82nd Cong., 2nd Sess. 5, *reprinted in* 1952 U.S.Code Cong. & Ad. News 1653, 1712. It is unlikely that Congress meant to prohibit fee shifting in its reference to Section 292 within the very context of delineating aliens' rights. Thomas W. Holm, *Aliens' Alienation From Justice: The Equal Access to Justice Act Should Apply To Deportation Proceedings*, 75 Minn.L.Rev. 522-523 n. 140 (1991).

EAJA and Section 292 enjoy two entirely separate domains. Section 292 addresses the relationship between indigency and the right to counsel; EAJA is a fee-shifting statute (whether counsel is paid or not) to reimburse the expense of repelling unjustified and unreasonable government action. *Escobar-Ruiz*, 838 F.2d at 1026; *citing*, H.R. Rep No. 120, 99th Cong., *reprinted in* 1985 U.S. Code Cong & Ad. News 132, 132-133. In the case at bar, Petitioner did not request the appointment of counsel at government expense. Petitioner procured counsel through her own efforts and prevailed. Instead, Petitioner seeks to recover her attorney's fees under the EAJA fee-shifting statute since the government acted unreasonably. An award to her would fulfill EAJA's purposes without impinging upon, let alone undermining, the purposes of Section 292.

Thus, Section 292 and EAJA are not incompatible. This Court has held that "when there are two statutes that are capable of coexistence, it is the court's duty, absent a clearly expressed congressional intent to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535 (1974). To determine whether two statutes are capable of co-existence, courts must look to the Congressional purposes behind the enactments. *Id.* at 551. Courts must interpret the statutes to give effect to both if congressional purposes still can be met. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976).

Because of their differing purposes, Section 292 (relationship between indigency and the right to counsel) and EAJA (fee-shifting to reimburse expenses of repelling unjustified and unreasonable government action) can and should co-exist, and both can be given full effect.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

David N. Soloway
Counsel of Record
Carolyn Frazier Soloway
Counsel for Petitioner

Frazier, Soloway & Poorak
1800 Century Place
Suite 100
Atlanta, Georgia 30334
(404) 320-7000

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